Clarence Ng Chii Wei (suing through litigation representatives Ng Kean Pong and Wong Shiau Lan) & Ors v Menteri Kesihatan & Ors

HIGH COURT (PULAU PINANG) — APPLICATION FOR JUDICIAL REVIEW NO PA-25–48–08 OF 2021
WONG HOK CHONG JC
29 OCTOBER 2021

Civil Procedure — Judicial review — Certiorari and mandamus — Applicants sought order to quash government's decision to implement Covid-19 vaccination programme for teenagers using Pfizer vaccine — Applicants wanted implementation shelved until clinical trials had determined whether alternative drug was more effective for the programme — Whether applicants had satisfied threshold locus standi to apply for the Judicial Review ('JR') proceedings — Whether subject matter of the JR application was non-justiciable since it involved a matter the court was ill-suited to adjudicate upon — Whether applicants had not satisfied mandatory requirements in order to ask for mandamus orders — Whether applicants had not shown that: (a) respondents had failed to perform a legal duty that was imposed on them; and (b) that applicants had a legal right to compel the performance of that duty

The 18 applicants herein sought leave of court to file a judicial review ('JR') application to challenge the first and second respondents' decision to vaccinate children aged between 12 years and 17 years in the country against the Covid-19 coronavirus using the Comirnaty (Pfizer-BioNTech) vaccine ('the programme'). By the time the leave application came up for hearing, only the first, sixth, seventh, ninth, tenth, eleventh and eighteenth applicants — all aged between 12 years and 17 years — pursued with the application and, at the same time, applied for the programme's implementation to be stayed until the substantive JR application had been determined. In the JR application, the applicants sought an order of certiorari to quash the decision to implement the programme on the ground that it was being rushed into when clinical trials had yet to be concluded to determine whether it might be more efficacious to use a drug named Ivermectin for the programme. The applicants also sought an order of mandamus to compel the respondents to use Ivermectin for the programme if the clinical trials proved that it was better to use that drug rather than the Comirnaty; but if the trials proved otherwise for Ivermectin, then the respondents be compelled to (a) disclose the risks associated with the use of the Comirnaty vaccine; (b) ensure that unvaccinated teenagers were not discriminated against; and (c) conduct post mortems on deaths that might have resulted from the use of the Comirnaty vaccine. The applicants contended that

since they were adversely affected by the decision to implement the programme (they contended that their fundamental rights under arts 5(1) and 8(1) of the Federal Constitution were infringed) and since the subject matter of the JR proceedings fell within the ambit of 'public interest litigation', they had satisfied the threshold locus standi to commence the proceedings. The attorney general ('AG') opposed the leave application on the ground that the subject matter of the JR application was non-justiciable in that it concerned matters that were based on government policy considerations and management prerogatives which the court was ill-suited to adjudicate upon. In any event, the AG argued, the application had no prospect of success because, inter alia, the applicants could not avail of the relief of mandamus since they had failed to show that the respondents had failed to perform a legal duty that was imposed on them and that the applicants had a corresponding legal right to compel the performance of that duty.

Held, dismissing the leave application:

(1) The court agreed with the AG that this was a matter of government policy and management prerogative premised significantly on medical and scientific opinion. It was something that the court was ill-suited to adjudicate upon and it was best left to the executive which had the benefit of relevant expertise and opinions. There was no infringement of the fundamental rights of the applicants. The respondents' decision to implement the vaccination programme did not impose any legal obligation on the applicants, or on any other teenager for that matter, to be vaccinated. It was entirely voluntary. Therefore, in the absence of compulsion, there was no question of the applicants' personal autonomy being infringed by the programme. In the premises, the matter was not justiciable, ie, not amenable to judicial review (see paras 20, 39 & 53).

(2) The mandamus orders sought by the applicants were a wish list. They were not anchored on any specific legal public obligation incumbent upon the respondents; nor did the applicants have any corresponding legal right to enforce such obligation. The mandatory components for the mandamus orders to issue were lacking with no prospect of success. The respondents had already made necessary disclosures concerning the risks associated with the Comirnaty vaccine. The question of unvaccinated teenagers being barred from attending school was unrelated to the subject matter of the JR application and the applicants had to separately challenge such a decision if there was one. As to the prayer calling for the implementation of an Ivermectin programme, it was hypothetical and abstract since the clinical trials on that drug had yet to be concluded. All these shortcomings on the part of the applicants were fatal and there was no prospect of the substantive mandamus application succeeding (see paras 61 & 63–67).

(3) Since the application for leave to file the JR application was denied, the application to stay the vaccination programme became otiose. In any event, even if the court had been minded to grant the leave application, the stay application would have been refused as it was not in the interests of justice, for it would have adversely affected the government's efforts to contain the Covid-19 pandemic and it would have deprived the vast majority of the populace of their wish to be vaccinated (see paras 68–69).

[Bahasa Malaysia summary

18 pemohon di sini memohon kebenaran mahkamah untuk memfailkan permohonan semakan kehakiman ('JR') bagi mencabar keputusan responden pertama dan kedua untuk memvaksin kanak-kanak berumur antara 12 tahun dan 17 tahun di negara ini terhadap Covid-19 coronavirus menggunakan vaksin Comirnaty (Pfizer-BioNTech) ('program tersebut'). Pada masa permohonan kebenaran ditetapkan untuk pendengaran, hanya pemohon pertama, keenam, ketujuh, kesembilan, kesepuluh, ke-11 dan ke-18 — kesemuanya berumur antara 12 tahun dan 17 tahun — meneruskan permohonan tersebut dan, pada masa yang sama, memohon pelaksanaan program ini digantung sehingga permohonan JR substantif telah ditentukan. Dalam permohonan JR, pemohon memohon perintah certiorari untuk membatalkan keputusan melaksanakan program tersebut atas alasan bahawa ia sedang disegerakan tergesa-gesa apabila ujian klinikal masih belum dibuat untuk menentukan sama ada ia mungkin lebih mujarab untuk menggunakan ubat yang dipanggil Ivermectin untuk program tersebut. Pemohon juga memohon perintah mandamus untuk memaksa responden menggunakan Ivermectin bagi program tersebut sekiranya ujian klinikal membuktikan bahawa ianya lebih baik menggunakan ubat tersebut daripada Comirnaty; tetapi sekiranya ujian membuktikan sebaliknya bagi Ivermectin, maka responden terpaksa (a) mendedahkan risiko yang berkaitan dengan penggunaan vaksin Comirnaty; (b) memastikan bahawa remaja yang tidak divaksinasi tidak didiskriminasi dan; (c) menjalankan bedah siasat ke atas kematian yang mungkin disebabkan daripada penggunaan vaksin Comirnaty. Pemohon berpendapat bahawa memandangkan mereka terjejas teruk oleh keputusan untuk melaksanakan program tersebut (mereka berhujah bahawa hak asasi mereka di bawah perkara 5(1) dan 8(1) Perlembagaan Persekutuan telah dilanggar) dan oleh kerana perkara utama prosiding JR jatuh dalam lingkungan 'litigasi kepentingan awam', mereka telah memenuhi lokus standi ambang untuk memulakan prosiding. Peguam negara ('PN') menentang permohonan kebenaran tersebut atas alasan bahawa perkara utama permohonan JR adalah tidak wajar kerana ia melibatkan perkara berkaitan pertimbangan dasar kerajaan dan prerogatif pengurusan yang mahkamah tidak begitu sesuai untuk mengadili. Dalam apa jua keadaan, PN berhujah, permohonan tersebut tidak mempunyai prospek untuk berjaya kerana, antara lain, pemohon tidak dapat memanfaatkan relif mandamus kerana mereka gagal menunjukkan bahawa responden telah gagal melaksanakan tugas

undang-undang yang dikenakan ke atas mereka dan bahawa pemohon mempunyai hak undang-undang yang sepadan untuk memaksa pelaksanaan tugas tersebut.

Diputuskan, menolak permohonan kebenaran:

(1) Mahkamah bersetuju dengan peguam negara bahawa ini adalah soal dasar kerajaan dan prerogatif pengurusan yang berasaskan pendapat perubatan dan saintifik. Ia adalah sesuatu yang mahkamah tidak sesuai untuk mengadili dan sebaiknya diserahkan kepada eksekutif yang mempunyai manfaat kepakaran dan pendapat yang berkaitan. Tiada pelanggaran hak asasi pemohon. Keputusan responden untuk melaksanakan program vaksinasi tidak mengenakan sebarang kewajipan undang-undang ke atas pemohon, atau mana-mana remaja lain dalam hal tersebut untuk divaksinasi. Ia adalah secara sukarela sepenuhnya. Oleh itu, oleh kerana tiada paksaan, tidak timbul soal autonomi peribadi pemohon dilanggar oleh program tersebut. Justeru, perkara tersebut tidak berasas, iaitu, tidak boleh dipinda secara semakan kehakiman (lihat perenggan 20, 39 & 53).

(2) Perintah mandamus yang dipohon oleh pemohon adalah kehendak. Mereka tidak berlabuh pada mana-mana kewajipan awam undang-undang khusus yang dipertanggungjawabkan ke atas responden; pemohon juga tidak mempunyai hak undang-undang yang sepadan untuk menguatkuasakan kewajipan tersebut. Komponen wajib untuk perintah mandamus untuk dikeluarkan adalah berkurang tanpa prospek kejayaan. Responden telah membuat pendedahan yang diperlukan mengenai risiko yang berkaitan dengan vaksin Comirnaty. Soal remaja yang tidak divaksinasi dilarang menghadiri sekolah adalah tidak berkaitan dengan perkara utama permohonan JR dan pemohon terpaksa mencabar keputusan sedemikian secara berasingan sekiranya ada. Mengenai prayer untuk pelaksanaan program Ivermectin, ia adalah bersifat hipotesis dan abstrak kerana ujian klinikal ke atas ubat itu masih belum selesai. Kesemua kelemahan di pihak pemohon ini adalah memudaratkan dan tiada prospek bagi permohonan mandamus substantif untuk berjaya (lihat perenggan 61 & 63–67).

(3) Memandangkan permohonan untuk kebenaran memfailkan permohonan JR telah ditolak, permohonan untuk mengekalkan program vaksinasi menjadi sia-sia. Walau apa pun, sekiranya mahkamah bercadang untuk membenarkan permohonan kebenaran tersebut, permohonan penggantungan akan ditolak kerana ia bukan untuk kepentingan keadilan, kerana ia akan menjejaskan usaha kerajaan untuk membendung wabak Covid-19 dan ia akan menghalang sebahagian besar penduduk daripada keinginan mereka untuk divaksinasi (lihat perenggan 68–69).]

Cases referred to

Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007] 5 MLJ 441, HC (refd)
Dolan and others v Secretary of State for Health and Social Care and another [2020] EWHC 1786 (Admin), HC (refd)
Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia [2013] 2 MLJ 321, FC (refd)
Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad [2004] 5 MLJ 495, HC (refd)
Letitia Bosman v PP and other appeals (No 1) [2020] 5 MLJ 277, FC (folld)
Peguam Negara Malaysia v Chin Chee Kow (as Secretary of Persatuan Kebajikan and Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443, FC (refd)
Peguam Negara Malaysia v Dr Michael Jeyakumar Devaraj [2012] 1 MLJ 179, CA (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164, CA (refd)
R (on the application of Dolan and others) v Secretary of State for Health and Social Care and another [2021] All ER 780, CA (refd)
Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor [2018] 4 MLJ 350, FC (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2017] 4 MLJ 521, CA (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 213, CA (refd)
Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors [2011] 1 MLJ 128, HC (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296, FC (refd)

Legislation referred to

Federal Constitution arts 5, 5(1), 8, 8(1), 121
Rules of Court 2012 O 53

Lee Khai (Eric Cheah, Teh Chiew Yin and Nicole Koh with him) (Ong & Manecksha) for the applicants.
Suzana bt Atan (Narkunavathy a/p Sundareson, Noor Atiqah bt Zainal Abidin, Mohammad Sallehuddin bin Md Ali and Rahazlan Affandi bin Abdul Rahim with her) (Attorney General's Chambers) for the respondents.

Wong Hok Chong JC:

PARTIES

[1] There were, to begin with, 18 applicants at the commencement of this proceeding. By the time of the hearing, 11 had withdrawn their application, leaving the seven incumbent applicants — applicants No 1, 6, 7, 9, 10, 11 and

A 18. They are all teenagers between the ages of 12–17 represented by their respective litigation representatives ('applicants').

[2] The respondents are the 'Menteri Kesihatan' (first respondent), 'Ketua Pengarah Kesihatan Malaysia' (second respondent), 'Menteri Sains Teknologi dan Inovasi' (third respondent) and 'Kerajaan Malaysia' (fourth respondent).

JUDICIAL REVIEW — LEAVE STAGE

[3] This is an application for judicial review. Under O 53 of the Rules of Court 2012 ('the RC'), the applicants must first obtain the leave of court before proceeding with the substantive application for the reliefs, in this case, of certiorari and mandamus.

[4] The instant hearing is for leave of court. In addition, the applicants are also applying for a stay of proceedings pending the court's decision on the substantive application. The proceedings here refer to the immunisation program for teenagers that the applicants seek to quash.

[5] The applicants' complaint is against the Ketua Pengarah Kesihatan Malaysia's (second respondent) circular dated 12 August 2021 ('circular') directing the implementation of the national immunisation program for teenagers aged 12–17 ('immunisation program for teenagers'). This was supplemented by the Kementerian Kesihatan Malaysia's (first respondent) guideline dated 13 August 2021 ('guideline') naming 'Comirnaty (Pfizer–BioNTech)' ('Comirnaty') as the vaccine of choice for this program (collectively referred to as the 'decision').

CERTIORARI

[6] The applicants seek for an order of certiorari to quash the decision. They say that the decision is illegal and/or irrational in light of the following circumstances:

(a) there is a possible alternative treatment in Ivermectin, which is already undergoing clinical trials;

(b) it is only after the results of the Ivermectin clinical trials are known that the respondents will be able to compare the risks, efficacy and other factors associated with Comirnaty and Ivermectin to reach an informed decision on which offers the better treatment; and

(c) it is irrational and/or illegal to rush into the decision before awaiting the results of the Ivermectin clinical trials.

[7] Ancillary to the certiorari order, the applicants seek for an order to stay the immunisation program for teenagers pending the completion of the Ivermectin clinical trials.

MANDAMUS

[8] The applicants also seek for an order of mandamus to compel the respondents to take the following action:

(a) if the result of the Ivermectin clinical trials shows it to be a better treatment, the respondents be compelled to implement an Ivermectin program; and

(b) if the results of the Ivermectin clinical trials shows otherwise, the respondents be compelled to:

(i) provide a comprehensive disclosure of risks associated with Comirnaty when obtaining the patients' consent;

(ii) to ensure that non-vaccinated teenagers are not discriminated; and

(iii) to conduct post mortem on any deaths that may be associated with the use of Comirnaty.

ATTORNEY GENERAL OBJECTS TO LEAVE

[9] The attorney general objects to the granting of leave as he is entitled to in matters of public interest (*Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad* [2004] 5 MLJ 495*).*

THE FACTS AT LEAVE STAGE

[10] The grounds for granting leave, and the attorney general's objections thereto, do not require an in-depth examination of the merits of the two treatments. They are premised on the broad facts and legal grounds. As such, there is no need at this juncture for an elaborate discourse on the risks, efficacy and other material factors associated with the treatments. That will be saved for the substantive hearing should we come to it.

LOCUS STANDI

[11] As mentioned earlier, the applicants comprise just seven individuals residing in Penang. Yet, they seek quash the decision that directly affects all teenagers in the country and will hamper the government's overall effort to combat Covid-19 pandemic. It begs the question whether the applicants have the locus standi to commence this judicial review proceeding.

[12] The applicants say that they have locus standi as adversely affected persons and that, at the leave stage, they only need to show threshold locus standi (as opposed to substantial locus standi).

[13] These terms, threshold and substantial locus standi, were explained by the Court of Appeal in *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 ('QSR') as follows:

> LOCUS STANDI
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> [11] Historically speaking, the requirement of standing to approach a court for judicial review was one that was established by the courts to keep out litigants who had no legitimate grievance against the administrative arm of the state. The object was to prevent them from crossing the threshold of the courts of justice. This requirement established by judges for themselves that only those with a legitimate grievance may cross the threshold and enter the court is what is known as 'threshold locus standi'. It is quite different from the doctrine of 'substantive locus standi', which falls to be determined by court at the very end of the case, when it comes to decide whether on the facts and circumstances discretion ought to be exercised in the applicant's favour (see *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] 2 MLJ 177).

[14] The court went on to explain the difference between the threshold locus standi for:

(a) an action in private law for the remedies of declaration and injunction against public bodies — that is the strict threshold locus standi test of 'self-interest'; and

(b) public law remedies of certiorari, mandamus and other prerogative writs under O 53 of the Rules of Court 2012 — that is the more liberal threshold locus standi test of being adversely affected.

[15] In the context of the threshold locus standi for leave to proceed with judicial review, the term, adversely affected, was explained as follows:

> [15] By contrast, certiorari and the other prerogative remedies were classified as public law remedies which permitted a far more liberal threshold locus standi test to be met. Hence, Lord Wilberforce said in *Gouriet v Union of Post Office Workers* [1978] AC 435 that in applications for prerogative writs in the environment of public law enforcement the courts have allowed applicants 'liberal access under a generous conception of locus standi'.
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> [16] It is to rid this dichotomous approach which often produced injustice that O 53 in its present form was introduced. There is a single test of threshold locus standi for all the remedies that are available under the order. It is that the applicant should be 'adversely affected'. The phrase calls for a flexible approach. It is for the applicant to show that he falls within the factual spectrum that is covered by the words 'adversely affected'. At one end of the spectrum are cases where the particular applicant has an obviously sufficient personal interest in the legality of the action

impugned (see *Finlay v Canada* [1986] 33 DLR 421). This includes cases where the complaint is that a fundamental right such as the right to life or personal liberty or property in the widest sense (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261) has been or is being or is about to be infringed. In all such cases, the court must, *ex debito justitiae*, grant the applicant threshold standing (see for example *Thorson v Attorney General of Canada* [1975] 1 SCR 138.

[17] At the other end of the spectrum are cases where the nexus between the applicant and the legality of the action under challenge is so tenuous that the court may be entitled to disregard it as *de minimis*. In the middle of the spectrum are cases which are in the nature of a public interest litigation. The test for determining whether an application is a public interest litigation is that laid down by the Supreme Court of India in *Malik Brothers v Narendra Dadhich* AIR 1999 SC 3211, where, when granting leave, it was said:

> [P]ublic interest litigation is usually entertained by a court for the purpose of redressing public injury, enforcing public duty, protecting social rights and vindicating public interest. The real purpose of entertaining such application is the vindication of the rule of law, effective access to justice to the economically weaker class and meaningful realisation of the fundamental rights. The directions and commands issued by the courts of law in public interest litigation are for the betterment of the society at large and not for benefiting any individual. But if the court finds that in the garb of a public interest litigation actually an individual's interest is sought to be carried out or protected, it would be bounden duty of the court not to entertain such petition as otherwise the very purpose of innovation of public interest litigation will be frustrated.

[16] In summary, a person may be adversely affected in two ways. First, where he is personally affected and this includes circumstances where a fundamental right such as the right to life or personal liberty is being infringed. Second, he is bringing forth a public interest litigation.

[17] As the term, threshold locus standi, itself suggests, the test at the leave stage is a relatively low one. Leave should only be refused where the application was frivolous and not upon any predetermination of the merits of the substantive application. This was explained by the Court of Appeal in *QSR*:

> [3] The very first point that we would make is that arguments such as the availability of an alternative remedy go to the merits of the substantive application for judicial review and ought never to be dealt with at the leave stage. The sole question at the leave stage is whether the application is frivolous. As Raja Azlan Shah LP observed in *Mohamed Nordin bin Johan v Attorney General, Malaysia* [1983] 1 MLJ 68 (at p 70):
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> We allowed the appeal and granted the appellant leave to apply for an order of certiorari because we are of the view that the learned judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari.

A [4] And as Abdoolcader SCJ said in *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134 (at p 135):

> At the outset of the hearing of the appeal before us we were of the view ex facie that leave should in fact have been granted in the court below as the point taken by the appellant was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari.

B [5] In *Tang Kwor Ham v Pengurusan Danaharta Nasional Bhd* [2006] 5 MLJ 60; [2005] 1 LNS 179, this court in its majority judgment sought to collect and discuss the several authorities on the subject and concluded as follows:

C > To paraphrase in less elegant language what has been said in these cases, the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in parliament (see art 63 of the Federal Constitution).

D That is a view to which we adhere.

E **[18]** In the present case, the applicants say that leave should be granted as they are adversely affected in both the abovementioned ways:

(a) the decision infringed their fundamental right to personal liberty (or personal autonomy) under arts 5(1) and 8(1) of the Federal Constitution:

F > Article 5(1)
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> No person shall be deprived of his life or personal liberty save in accordance with the law.
>
> G Article 8(1)
>
> All persons are equal before the law and entitled to the equal protection of the law.

H (b) the subject matter in this proceeding falls within the ambit of 'public interest litigation'.

[19] Establishing threshold locus standi, however, does not automatically mean that leave will be granted. There are other grounds on which leave may be I refused. These include the two grounds that the attorney general has raised in his objection.

[20] But before I turn to the attorney general's grounds, I wish to express my reservation on the proposition that the applicants' fundamental right to

personal autonomy is being infringed. It is not in dispute that the decision does not impose any legal obligation on the applicants, or any teenagers for that matter, to be vaccinated. It is entirely voluntary. Therefore, in the absence of compulsion, there is no question of the applicants' personal autonomy being infringed.

THE OBJECTION: NOT JUSTICIABLE

[21] I turn now to the grounds that the attorney general has raised in their objection to the granting of leave.

[22] First, in respect of the overall application for certiorari and mandamus, the attorney general says that the decision and the acts that the applicants would have the respondents do are matters that are based on government policy considerations and management prerogatives. Such matters are not amenable to judicial review, ie, not justiciable. In addition, the application also has absolutely no prospect of success.

[23] These objections can be decided at the leave stage. On justiciability, the Federal Court in *Dr Michael Jeyakumar Devaraj v Peguam Negara Malaysia* [2013] 2 MLJ 321 ('Dr Michael Jeyakumar') held as follows:

> [22] We are also in agreement with the Court of Appeal that, the issue of whether the decision of the first respondent and/or the second respondent is amenable to judicial review could be decided at the leave stage. Like the Court of Appeal we are not persuaded with the appellant's contention that the issue should only be decided at the substantive stage. Our view is that no further evidence is necessary in this case, as rightly pointed by the learned senior federal counsel, the supporting documents exhibited by the appellant which include information from the Prime Minister's Department's webpage of the first respondent's activities and the questions and answers regarding the Special Constituency Allocation in parliament are sufficient material for the court to decide on the issue.
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> [23] With respect, we see no purpose for the High Court to grant leave just for the purpose of investigation on a full inter parties basis, when the supporting documents exhibited by the appellant clearly show that the appellant has no arguable case. Hence, the Court of Appeal was right to set aside the order of the High Court in granting leave to institute judicial review proceedings. We are of the same view with the Court of Appeal that leave to institute judicial review proceedings ought not to have been granted by the High Court in this case.

[24] And on the absolute lack of prospect of success, the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296, held as follows:

> [12] ... leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the

application though ie unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

BACKGROUND FACTS

[25] In this case, the attorney general says that the matters raised by the applicants are part of the respondents' effort to combat the Covid-19 pandemic, a worldwide health crisis from which Malaysia has not been spared. It is more than a health crisis. It may have begun as such, but it quickly became a social, political and economic crisis, and more — almost every aspect of life as we know it has been upended and, sometimes, with fatal consequences.

[26] The crisis is unprecedented and is not static. As the medical and scientific communities learn more about the virus — how they mutate into more infectious and transmissible variants — so too are the measures to combat the virus evolving.

[27] Time is of the essence. The medical and scientific communities have been thrusted into developing and producing vaccines at an unprecedented rate. A remarkable achievement if I may say so. However, there are inevitable residual risks that cannot be fully discounted due to the constraint of time. Nevertheless, the conventional wisdom is that the pros of vaccination far outweigh the cons. Most, if not all, countries have decided to vaccinate the populace as widely and as quickly as possible to achieve herd immunity.

[28] Hence, the respondents' decision to roll out the vaccination program for Malaysia. To date, I am given to understand that more than 90% of the adult population have been voluntarily vaccinated and the outcome has been encouraging. The immunisation program for teenagers is just the next phase of the overall vaccination program.

[29] Measures have also been taken on other fronts to battle the pandemic. These include (complete, partial and conditional) lockdowns and various standard operating procedures to reduce the risk of infections in economic, social and workplace environments.

[30] As the applicants have highlighted, alternative medical options are also being explored. Ivermectin is undergoing clinical trials. At the end of which, the respondents will weigh the benefits and risk of using Ivermectin as an alternative or additional treatment. As of now, there is no determination on the use Ivermectin.

THE POLICY AND MANAGEMENT PREROGATIVE

[31] It is in light of these circumstances that the attorney general says that these are matters of government policy considerations and management prerogatives. They are not amenable to judicial review, ie, not justiciable, and leave should not be granted.

Tengku Muhammad Fakhry

[32] The concept of justiciability was explained by the High Court in *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128 ('Tengku Muhammad Fakhry'). It is an excellent discourse that has been authoritatively affirmed by the Federal Court in *Peguam Negara Malaysia v Chin Chee Kow (as Secretary of Persatuan Kebajikan and Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443. The relevant passages read as follows:

> The concept of justiciability
>
> [8] Justiciability relates to the sixth ground stated above — whether judicial review is an appropriate procedure. It can be subsumed even under grounds (v) and (iv). The issue can also be stated as whether the subject matter is 'amenable to judicial process', a phrase which appears in the House of Lords decision in Council of *Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935; [1985] 1 AC 374, per Lord Roskil. Generally, an issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitabillty of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination.
>
> The learned authors of *Duma Das Basu's Human Rights in Constitutional Law* (2nd Ed, Reprint 2005) observe with deserving scholarship as follows:
>
> > Limits of Judicial Review of Executive Acts
> >
> > Even where it appears prima facie that some fundamental right has been violated by an executive act, the court cannot interfere with that act on the ground of unconstitutionality because of general principles relating to the limits of the judicial method and the rule of the judiciary, and the lack of satisfactory criteria for a judicial determination of certain questions.
> >
> > Non–Justiciable Issues
> >
> > In connection with the unconstitutionality of legislation, we have seen that even where a fundamental right has been invaded by a statute, the individual who is affected thereby may not have a remedy from a court of law, because the issue involved is not justiciable.
> >
> > ... the most prominent amongst non-justiciable issues are those which are known in the USA as 'political questions', which means that the subject matter of the question is such that it is not capable of a judicial determination (at p 256).

[10] The learned authors of *De Smith's Judicial Review* (6th Ed) have also appropriately observed in this connection that despite the wholesome development of administrative law, 'the fact remains, however, that there are some issues which are inherently unsuited to adjudication' and in this category of case, 'the court acknowledges that the litigation process and the expertise of the court are unsuited to resolving the question in hand' (at p 121).

[11] A good definition of 'justiciability' can also be found in Chris Finn, *The Concept of 'Justiciability' in Administrative Law in Groves & Lee, Australian Administrative Law* (2007):

> The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a court which feels that its resolution either is beyond the institutional competence of the court or would involve stepping outside its appropriate constitutional role (at p 143).

[33] In summary, matters that the court is ill-suited to adjudicate upon, matters that are more suitably left to the executive or legislative arm of government or matters that the court exercises self-restrained from interfering with, are not justiciable.

Dr Michael Jevakumar

[34] Included are matters that pertain to government policy and management prerogative shaped by political, social and economic interests and, where called upon, expert opinions or technical expertise.

[35] This was illustrated in *Dr Michael Jevakumar* where the Federal Court found that the government's decision on the allocation of funds to a particular constituency was not justiciable. The judgment, in highlighting this point, referred to the authoritative textbook *Principles of Administrative Law*:

> [19] In this regard, we would quote the relevant passages of the renown authors, MP Jain and SN Jain from their book entitled *Principles of Administrative Law* (6th Ed), at p 1069:
>
> > It is not normally within the domain of any court to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying or annulling it, based on howsoever sound and good reasoning, except where it is arbitrary or violative of any constitution, statutory or any provision of law. When the government forms its policy it is based on a number of circumstance on facts, law, including constraints based on these resources. It is also based on its expert opinion, it would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits. The court would dissuade itself from entering

into this realm which belongs to the executive (see *State of Punjab v Ram Lubhaya Bagga* AIR 1998 SC 1703). On matters affecting policy and requiring technical expertise, the court would leave the matter for decision of those who are qualified to address this issue. Unless the policy or action is inconsistent with the constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters (see *Federation of Railway Officers Assn v UOI* AIR 2003 SC 1344).

[20] ... courts must be wary of unduly extending its judicial arms to policy matters which are exclusively within the domain of the executive. Unwarranted usurpation and transgression by the judiciary into the realm of the executive and vice versa will bring about disrepute to our system of government which upholds the separation of powers between the three main components vis a vis the executive, the legislature and the judiciary.

Dolan (English High Court)

[36] A recent case of particular relevance and importance is *Dolan and others v Secretary of State for Health and Social Care and another* [2020] EWHC 1786 (Admin) ('Dolan HC'). It is an English case dealing with the granting of leave/permission for pursue judicial review against the common background of the Covid-19 pandemic.

[37] The applicants there sought permission/leave to pursue judicial review against the government's decision to close schools and educational establishments in response to the Covid-19 pandemic. The High Court denied the leave application for these very reasons. The relevant passages from the High Court judgment in *Dolan HC* read as follows:

7 The role of the court in judicial review is concerned with resolving questions of law. The court is not responsible for making political, social, or economic choices. The court is not responsible for determining how best to respond to the risks to public health posed by the emergence of a novel coronavirus. Those decisions, and those choices, are ones that the parliament has entrusted to ministers and other public bodies.

117 ... the context in which the restrictions were imposed, however, was of a global pandemic where a novel, highly infectious disease capable of causing death was spreading and was transmissible between humans. There was no known cure and no vaccine. There was a legal duty to review the restrictions periodically and to end the restrictions if they were no longer necessary to achieve the aim of reducing the spread and the incidence of coronavirus. The regulations would end after six months in any event. In those, possible unique, circumstances, there is no realistic prospect that a court would find that regulations adopted to reduce the opportunity for transmission by limiting contact between individuals was disproportionate. Permission to apply for judicial review on that ground is refused.

A INFRINGE FUNDAMENTAL RIGHTS

[38] The applicants, in response, say that a decision that infringes on one's fundamental rights is always justiciable. In this case, they say that the decision infringes on their personal autonomy to choose whether or not to be vaccinated. This is so even if the decision is a matter of government policy and management prerogative.

[39] I do not fully agree with the applicants' legal proposition, but before I address that, I wish to first draw attention to my earlier point that the applicants' proposition that the decision infringes upon their personal autonomy is itself unfounded. The applicants have skirted the fact that the vaccination program is entirely voluntary. Hence, there simply is no compulsion and no ones' personal autonomy is being infringed.

[40] Coming back to the legal issue. To support their legal contention, the applicants have referred to two judgments of Justice Hamid Sultan — one when he was sitting in the High Court and the other in the Court of Appeal — holding that matters that infringed on one's fundamental rights are justiciable.

[41] In the High Court case of *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 5 MLJ 441 ('Chong Chung Moi'), the learned judge held as follows:

> [21] ...
>
> (vi) ... Where decisions are perceived to be unconstitutional, the courts have a judicial duty coupled with sacrosanct entrustment of the public, pursuant to the doctrine of the separation of powers and oath office, to revisit such decisions in the wider interest of the public and also to uphold their esteem and dignity as judges of their constitution and also as the component pillar of the Federal Constitution. At the same time, the judiciary has sacrosanct duty to ensure that the functions of the executive and the legislature, in the right perspective, are not undermined. There is a balance of cardinal importance which has to be met with to maintain the respective role and status quo of the pillars ...
>
> (x) ... It will appear to be unnecessary as this creates utter confusion, for under the doctrine of separation of powers, the court is the supreme body to decide what is right and what is wrong in any given circumstance. More so when it has to check any form of errors, whether they be judicial or on merit, the court can and always must act to cure any form of injustice within the parameter and scope of the doctrine of separation of powers, to be read with the spirit and intent of the Federal Constitution ...
>
> (xi) ... For this very purpose, each pillar has to respect the role of the other, and there is sufficient provision in the constitution and law to check each and every pillar's excesses and make them accountable to the public. One such provision permits the judges to be removed and the other is the provision for judicial review to check

among others executive excesses. Thus, it is a well planned constitution and law, provided it is given full force and effect. No pillar is supreme. All are subject to accountability ...

[42] Later, sitting in the Court of Appeal in *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213 ('Teh Guat Hong No 1'), the learned judge held as follows:

[16] ...

(vii) ... The jurisprudence on justiciability on policy matters where the doctrine of Constitutional Supremacy applies is well articulated by the Indian Supreme Court in the *State of Rajasthan & Ors v Basant Nahata* AIR 2005 SC 3401, where it was stated:

> The contention raised to the effect that this court would not interfere with the policy decision is again devoid of any merit. A legislative policy must conform to the provisions of the constitutional mandates. Even otherwise a policy decision can be subjected to judicial review (see *Cellular Operators Association of India and Ors v Union of India and Ors* [2002] SUPP 5 SCR 222 and *Clariant International Ltd and Anr v Securities & Exchange Board of India* AIR 2004 SC4 236).

(ix) ... The legitimate complaint and expectation of the public by constitutional challenge or by way of judicial review cannot be brushed aside on the ground of non-justiciability which is in vogue in England, when the complaint relates to public law element which may have a direct nexus to the Federal Constitution and/or fundamental guarantees provision.

[43] In summary, the court has a role to check unconstitutional decisions of the executive or legislative arm of government. Therefore, such matters are necessarily justiciable.

THE COURT'S VIEW

[44] The attorney general and the applicants have both made valid propositions of law. However, they need to be qualified, especially when the two propositions come into conflict.

[45] The attorney general says that all matters of government policy and management prerogative are not justiciable. I acknowledge that there is a tendency, or even an assumption, that the court is normally not equipped to make a competent assessment on decisions borne out of government policy and management prerogative. But that is not to say that all such decisions are non-justiciable as matter of rule. They must still undergo the tests on justiciability on a case-by-case basis.

[46] Conversely, the applicants say that all matters that infringe upon fundamental rights are justiciable. I acknowledge that the court has a role to check unconstitutional decisions of the executive or legislative arm of government, but that does not mean that all such decisions are justiciable.

[47] This is especially so when the impugned decision is arguably non-justiciable, ie, a matter that the court is ill-suited to adjudicate upon, a matter that the court has restrained itself from interfering with or a matter more suitably left to the executive or legislative arm of government, including a decision borne out of government policy and management prerogative.

[48] In such circumstances, when a court considers the justiciability of an impugned decision, one of the factors taken into account is the gravity of the offence caused by that decision. Hence, where it infringes upon one's fundamental rights, the court will naturally be more amenable to judicial intervention. But that is not to say that all such decisions are justiciable as a matter of rule. As with all such cases, they must still undergo the tests on justiciability.

[49] In summary, the opposing propositions are but generalized outcomes of certain classes of circumstances. They are not hard and fast rules. They must, at the end of the day, be assessed on the facts of each case to determine whether it is justiciable.

Dolan (English Court of Appeal)

[50] The English Court of Appeal in affirming the High Court's decision in *Dolan HC (R (on the application of Dolan and others) v Secretary of State for Health and Social Care and another* [2021] All ER 780 ('Dolan CA')) shared the same view when addressing this very issue in the context of the purported infringement of certain rights under European Convention for the Protection of Human Rights and Fundamental Freedoms 1950:

> [95] Article 8 guarantees the right to respect for private and family life. It is one of the qualified rights in the Convention. In that context we would reject the submission to the effect that if it is arguable that there has been an interference with a qualified Convention right, permission must be granted, since the onus is on a defendant to show justification for that interference. There is no such general principle. Much will depend on the particular facts. If it is possible for a court to say with confidence, even at the permission stage, that there was unarguably a justification for any interference with a qualified Convention right, it may properly refuse permission.

Letitia Bosman

[51] On the considerations for judicial intervention against decisions borne of government policy and management prerogative that infringe upon one's fundamental or constitutional rights, we are guided by the expansive judgment of the Federal Court in *Letitia Bosman v Public Prosecutor and other appeals (No 1)* [2020] 5 MLJ 277 ('Letitia Bosman'). It concerned the constitutionality of the mandatory death penalty in light of arts 5, 8 and 121 of the Federal Constitution. Although not a judicial review proceeding, the principles expounded are very much relevant to the issue at hand.

[52] *Letitia Bosman* stresses that, under the doctrine of the separation of powers between the three branches of government, the judiciary should not be overzealous to interfere in matters under the realm of the legislature that it was not or poorly equipped for. The principles set forth are equally applicable to interference with the executive arm of government. The relevant passages from the judgment are reproduced as follows:

> [26] ... I will make some general observations as my starting point. It is about something of centrality of our FC: the doctrine of separation of powers ... At the core of the doctrine is the notion that each branch of the government must be separate and independent from each other. It has been said that for one branch of the government to usurp the rightful authority and power of another is to undermine the doctrine of separation of powers ...
>
> [27] ... While the court has a substantive constitutional role in reviewing the legislative act where deemed necessary to ensure legality, the task is complex as it also involves the appropriate measure of judicial deference the court should give the legislature on matters involving delicate and contentious area of social policy.
>
> [91] ... Lord Diplock ... expressed his reservations about judges reviewing decisions, which are laden with issues of policy:
>
> > ... In dealing with matters of public law, modesty I believe to be the most important of judicial virtues — the recognition that judges, however eminent in the law, are not the ultimate repositories of human wisdom in answering the kinds of social, economic and political questions with which parliament and administrators have to deal. Few of these questions are of a kind to which the best solution can be found by applying a judicial process or which the experience and training which a judge has acquired in the course of his career equips him to deal with better than other men ... The judge above all must resist a temptation to turn sociologist, economist, and politician, and in interpreting the written law to restrict that range of choice so as to exclude solutions which give effect to policies of which he himself strongly disapproves ...
>
> [92] ... In my opinion controversial matter of policy involving differing views on the moral and social issues involved is one circumstance where parliament is better placed to assess the needs of society and to make difficult choices between competing considerations ... The Hong Kong Court of Final Appeal made this point very clear in *Lau Cheong & Anor v HKSAR* [2002] 3 HKC 146; [2002] 2

A HKLRD 612.

> ... The legislature has to make a difficult collective judgment taking into account the rights of individuals as well as the interests of society. It has to strike a balance bearing in mind the conditions and needs of the society it serves, including its culture and traditions and the need to maintain public confidence ...

B

[95] Indeed, controversial matter of policy involving differing views on the moral and social issues involved is inherently a matter for determination by the elected legislature rather than the court. This issue has been considered in the recent case of *Regina (Nicklinson) and Another v Ministry of Justice and Others (CNK Alliance Ltd and Others Intervening); Regina (AM) v Director of Public Prosecutions and Others (CNK Alliance Ltd and Others Intervening)* [2015] AC 657. The UK Supreme Court had to deal with the issue concerning assisted suicide for terminally ill patients ... In his judgment, Lord Sumption JSC explained that there are three main reasons why the matter was entirely for parliament:

C

D

> 232 Third, the parliamentary process is a better way of resolving issues involving controversial and complex questions of fact arising out of moral and social dilemmas. The legislature has access to a fuller range of expert judgment and experience than forensic litigation can possibly provide. It is better able to take account of the interests of groups not represented or not sufficiently represented before the court in resolving what is surely a classic 'polycentric problem'.

E

[107] Court is not primarily in the business of articulating social or moral policy, which I see it as the domain of legislature ...

[108] Policies determination often requires surveys, investigation and reports conducted where the findings are on a macro scale. Legislature has the facilities and resources to undertake surveys, investigation and reports conducted where the findings are on a macro scale, which are useful tools in determining social policy. That's why the legislature is better placed than the courts to make difficult choices between competing considerations before deciding to prescribe the mandatory death sentence.

F

G [112] ... It is not our role to formulate policy. Court cannot substitute its view for the legislative policy decided by parliament ...

[113] ... All three branches of the government must respect each other's jurisdiction. Judiciary must respect the prerogatives of parliament. Judicial decision, which undermines parliament's lawful authority, would turn the rule of law on its head ...

H

THE FINDINGS

[53] Applying these principles to the instant case, I agree with the attorney general that this is a matter of government policy and management prerogative premised significantly on medical and scientific opinion. It is something that the court is ill-suited to adjudicate upon and that is best left to the executive who have the benefit of the relevant expertise and opinions. I have also taken into consideration the fact that there is no infringement upon one's fundamental rights. The applicants' personal autonomy is not infringed as the

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immunisation program for teenagers is voluntary. In the premise, I find that the matter is not amenable to judicial review, ie, not justiciable.

Dolan (English Court of Appeal)

[54] This view is not unprecedented. The English Court of Appeal in *Dolan CA*, speaking of the British government's efforts to combat the Covid-19 pandemic, came to the same conclusion:

> [89] We also bear in mind that this is an area in which the Secretary of State had to make difficult judgements about medical and scientific issues and did so after taking advice from relevant experts. Although this case does not arise under European Union law, we consider that an analogy can be drawn with what was said by Lord Bingham of Cornhill CJ in *R v Secretary of State for Health, Ex P Eastside Cheese Co (RA Duckett & Co, interested party)* (1999) 55 BMLR 38 at 58; [1999] 3 CMLR 123 at para 47: on public health issues which require the evaluation of complex scientific evidence, the national court may and should be slow to interfere with a decision which a responsible decision-maker has reached after consultation with its expert advisers.
>
> [90] We find it impossible to accept that a court could possibly intervene in this context by way of judicial review on the ground of irrationality. There were powerfully expressed conflicting views about many of the measures taken by the government and how various balances should be struck. This was quintessential a matter of political judgement for the government, which is accountable to parliament, and is not suited to determination by the courts.
>
> [97] In this context, as in the case of the other qualified rights, we consider that a wide margin of judgement must be afforded to the government and to parliament. This is on the well-established grounds both of democratic accountability and institutional competence. We bear in mind that the Secretary of State had access to expert advice which was particularly important in the context of a new virus and where scientific knowledge was inevitably developing at a fast pace. The fact that others may disagree with some of those expert views is neither here nor there. The government was entitled to proceed on the basis of the advice which it was receiving and balance the public health advice with other matters.

[55] Incidentally, this passage also rebuffs the applicants' suggestion that this principle is limited to political, social, or economic policies to the exclusion of medical and scientific opinions — which was, to begin with, a bare proposition.

THE POLICY/IMPLEMENTATION OF POLICY

[56] Lastly on this segment, there is one other lesser issue the applicant raised that should not be left unanswered. They say that they are challenging not the policy but the implementation the policy which, according to the Court of Appeal in *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional*

A [2017] 4 MLJ 521 (Teh Guat Hong No 2), is justiciable.

(For the record, *Teh Guat Hong No 1* was the appeal from the leave application whereras *Teh Guat Hong No 2* was the appeal from substantial hearing of the judicial review application.)

B

[57] There is no merit to this argument. The applicants here were patently targeting the policy (decision) itself. This is also self-evident from prayer 1(i) of the application itself:

C ... suatu Perintah Certiorari atas keputusan untuk melaksanakan Program Imunisasi COVID-19 Kebangsaan Di Kalangan Remanja Tertentu ...

OBJECTION: COMPONENTS FOR ORDER OF MANDAMUS TO ISSUE

D

[58] The second objection raised by the attorney general is in respect of the mandamus reliefs sought. He says that the mandatory components for an order of mandamus to issue have not been fulfilled. The two components were spelt out in the authoritative textbook MP Jain, *Administrative Law* at p 615:

E Mandamus, however, can be granted only when:

(a) a legal duty is imposed on an authority, and it does not perform it; and

(b) the applicant has a legal right to compel the performance of the that duty.

F **[59]** In elaboration thereof, (a) the legal duty to perform must be imperative, not optional or discretionary and (b) the legal right to compel must be clear, well defined and free from controversy. These were highlighted by the Court of Appeal in *Peguam Negara Malaysia v Dr Michael Jeyakumar Devaraj* [2012] 1 MLJ 179:

G [29] ...

(c) The applicant must show not only that he has a legal right to have the act performed but that the right is so clear and well defined as to be free from any reasonable controversy. The order cannot issue when the right is doubtful, or is a qualified one or where it depends upon an issue of fact to be determined by the

H public officer(s).

[30] ... The respondent must show, inter alia, that there is a legal or statutory duty on the part of the DG and/or the director as a matter of course to approve his 2010 application. The respondent must establish the existence of a duty of a public nature, the performance of which is imperative and not optional or discretionary ...

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MANDAMUS ORDERS SOUGHT

[60] Recapitulating on the prayers for the mandamus orders, they were to compel the respondents:

(a) to provide a comprehensive disclosure of risks associated with Comirnaty when obtaining the patients' consent;

(b) to ensure that non-vaccinated teenagers are not discriminated;

(c) to conduct post mortem on any deaths that may be associated with the use of Comirnaty; and

(d) to implement an Ivermectin program.

[61] This is a wish list. They are not anchored any specific legal public obligation incumbent upon the respondents, nor do the applicants have any corresponding legal right to enforce them. The applicants referred inter alia to the circular as a basis for the mandamus orders sought; but after reading through the circular, I found nothing there that imposed any legal public obligation on the respondents to do any of these acts nor vested any legal right on the applicants to enforce these acts.

[62] In respect of the first abovementioned prayer (disclosure), the applicants also referred to the *Malaysian Medical Council Guideline: Consent for Treatment of Patients by Registered Medical Practitioners* to substantiate their claim.

[63] The applicants are misconceived for a couple of reasons. First, like the circular, there was nothing there that imposed a legal public obligation on the respondents or that vested the applicants with the legal right to enforce such obligation. Second, the respondents are already making the necessary disclosures. The finer points, such as what and how to make the disclosures, are matters of discretion and management prerogative that, as explained earlier, are not justiciable.

[64] For the second abovementioned prayer (discrimination), the applicants alluded to the possible discrimination of barring non-vaccinated teenagers from attending school. If that is their grouse, then the appellant must challenge the decision (if there is one) to exclude non-vaccinated children from attending school. That is something quite apart from the decision on the immunisation program for teenagers in this matter.

[65] Finally, the last abovementioned prayer to implement the Ivermectin program is also hypothetical and abstract. It is conditional on the outcome of the Ivermectin clinical trials which has yet to be completed.

A THE FINDINGS

[66] I agree with the attorney general that these shortcomings are fatal and there is no prospect of the substantive mandamus application succeeding.

B DECISION

[67] In summary, I find that the subject matter of this judicial review application is not justiciable and that mandatory components for a mandamus order to issue are lacking with no prospect of success. As such, this court is not granting the applicants leave to proceed with judicial review on all the prayers.

C

STAY APPLICATION

D **[68]** In light of leave being denied, the application to stay the immunisation program for teenagers pending the court's decision on the substantive application is otiose.

[69] In any event and for completeness, I end by saying that this court would E not have granted a stay even if it were minded to grant leave. A stay would not have been in the interest of justice. It would adversely affect the government's overall effort to contain the Covid-19 pandemic and deprive the vast majority of the populace of their wish to be vaccinated.

F **[70]** The rationale for a refusal a stay in such circumstances was explained by the Federal Court in *Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor* [2018] 4 MLJ 350:

> [9] ... The stay order granted by the learned judge in the court below is very much closely akin to an injunction which in effect and substance operates to restrain or G prohibit the commission from performing its constitutional functions. The stay order ought not to have been granted as ultimately, such order directly prevents the House of Representatives from receiving the report and making a decision thereon ...
>
> ... The stay order has plainly interfered with the exercise of the public duties or H functions vested with the commission and the House of Representatives by the Federal Constitution. The law I would say, poses an insuperable obstacle in the way of the respondent and the learned judge ought to have regard to this trite legal position as any refusal to grant a stay in this case would also be consistent and in accordance with the inhibition imposed by the clear decided authorities in this I country.
>
> ... To quote the judgment of this court (which the learned judge in the court below failed to consider) in the case of *Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] 4 MLJ 656 at p 671:
>
> > ... but the stay order had also effectively stayed all the process of delimitation of

> constituencies including local enquiries for the whole of the Federal Territory of Kuala Lumpur. The stay order had thus paralysed and would have stultifying effect on the EC in the exercise of its constitutional functions ...
>
> In the case before this court, the next point of importance which the learned judge ought to have considered is the justice of the case. The learned judge, as it is clear to us, only takes into account the rights of the parties to the proceedings in this case. In my opinion, this is not a case of merely doing justice between the immediate parties to the proceedings. There is a wider interest of the democratic process, the doctrine of separation of powers and the parties that are concerned with the commission in carrying out its functions. The learned judge I need say, granted the stay order completely oblivious to the rights of the other states and electors in Peninsular Malaysia. This court is told that local enquiries in these states have been completed but the effect of the impugned stay order as earlier stated is to restrain the commission from preparing the report which it is required to do having completed the procedure prescribed in Part II of the Thirteenth Schedule which includes holding local enquiries. By ordering the stay, that really throws a spanner in the entire works of the delimitation of constituencies machinery.

Leave application dismissed.

Reported by Ashok Kumar